Office - Supreme Court.
FILED
AUG 20 1958
JOHN T. FEY, Clerk

No. 392

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. McDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRYANT H. CROFT
EARL P. STATEN

Counsel for Petitioner
351 South State Street
Salt Lake City, Utah

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement of the Case	2
Argument on Reasons for Granting Writ	4
Conclusion	8
Proof of Service	8
Appendix "A" Opinion and Judgment Below	9
Appendix "B" -- Rules	12

CITATIONS

Cases:	
Buckstaff v. Russell & Co., 151 U.S. 626, 38 L. Ed. 292	4
Greatreaks v. U. S., 211 F. 2d, 674	5
U. S. v. Peckham, 105 F. S. 775	6
U. S. v. Peckham, CA-DC, 210 F2d 693	6
Statutes:	
26 USCA 145(b) 1939 Code	3
Rules:	
Rules of Civil Procedure 43(c)	6

No._____

IN THE SUPREME COURT
of the
UNITED STATES

OCTOBER TERM, 1957

JOSEPH S. McDONALD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Joseph S. McDonald prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on June 20, 1957.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals has not been reported and is printed in Appendix A hereto, infra, p. 9.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1957. (Infra, Appendix A, p. 9). Rehearing was denied on July 22, 1957. (CA. R., p. 18) The jurisdiction of this Court is invoked under 28 USCA 1254(1) and Rule 22(2) of the Supreme Court Rules.

QUESTION PRESENTED

1. Did the Court of Appeals err in sustaining an erroneous exclusion of evidence by the trial court on the grounds that petitioner made no offer of proof concerning the evidence excluded where the trial court, in preliminary colloquy, declared in advance that evidence of such a nature was not admissable, and where the question clearly admits of an answer favorable to petitioner?

STATUTE INVOLVED

The statute involved in this case is 26 USCA 145(b) (1939 Code) which reads as follows:

> "Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

This petition seeks to review the judgment of

the Court of Appeals affirming a judgment convicting the petitioner of violation of 26 USCA 145(b) (1939 Code).

The indictment contained three counts, each charging petitioner with a willful attempt to defeat and evade a large part of the income tax due and owing to the United States by filing false income tax returns for each of three years. (T. 3, 4) Petitioner was tried to a jury and was acquitted on two counts and convicted on the third. (T. 7)

In the preparation of his returns petitioner, a builder, had omitted reporting the sales of houses (T. 146-148) and had, through a lack of understanding, (T. 105) erroneously shown as sources of most of the income returned the two lending institutions from which he had borrowed money to build his houses, and from which he had in fact received no income. (T. 105-108).

One of the witnesses called by the government was a certified public accountant with whom petitioner had consulted concerning his returns shortly after filing his income tax return for the year 1951, (T. 53) the year covered by the count on which conviction was obtained. (T. 4, 7) During cross examination counsel for petitioner made the accountant his own witness and asked the witness whether he had questioned petitioner as to why he had listed the sources of income shown on the tax returns. The witness replied that he had particularly asked petitioner concerning the same, whereupon the court interceded, invited an objection from the government, stated such conversation was not admissible in evidence, and excluded the same,

notwithstanding counsel's suggestion that statements by an accused person to third parties showing his state of mind were admissible. (T. 57-58)

The Court of Appeals, conceding as contended by petitioner that such statements or conversations under proper circumstances were admissible, took the position that even though the Rules of Criminal Procedure do not contain a provision comparable to Rule 43(c) of the Rules of Civil Procedure under which a party may make an offer of proof where an objection has been sustained to a question, an offer of proof was "nonetheless appropriate and proper" and that in the absence of an offer of proof, the court was unable to say whether reversible error resulted from the trial court's ruling, and thereupon affirmed the judgment. (Appendix A, p. 11, 12)

ARGUMENT ON REASONS FOR GRANTING WRIT

1. The decision of the Court below is in conflict with the ruling of this Court in *Buckstaff* v. *Russell & Co.*, 151 U.S. 626, 38 L. Ed. 292, wherein this Court stated:

> "If the question is in proper form and clearly admits of an answer relevant to the issues and favorable to the party on whose side the witness is called, it will be error to exclude it. Of course, the Court, in its discretion, or on motion, may require the party, in whose behalf the question is put, to state the facts proposed to be proved by the answer. But if that be not done, the rejection of the answer will be deemed error or not, according as the question, upon its face, if proper in form, may or may not clearly admit of an answer favorable to the party in whose behalf it is propounded."

Petitioner was charged with an attempt to evade taxes by filing a false income tax return. Any statement made by petitioner to a certified public accountant as to why he prepared his return in the manner that he did would have a very relevant and material bearing on intent, and particularly where, as here, such statements were made *before* any investigation was started by the Internal Revenue Service (T. 18, 55) and *shortly after* filing the 1951 return covered by the count on which conviction was obtained. (T. 110) The trial court not only did not require petitioner to state the facts proposed to be proved by the answer, but without objection from the government, proclaimed in no uncertain terms that such evidence was not admissible. (T. 57, 58) The witness had already testified that he had had a discussion with petitioner, had told petitioner his returns were incorrectly prepared, and had been told by petitioner he wanted to correct those returns. (T. 55) The government had refrained from asking the witness on direct examination of conversations the witness had had with petitioner concerning the preparation of his returns. (T. 55) Under these circumstances the question on its face clearly admits of an answer favorable to petitioner.

The decision of the Court below is also in conflict with the rule announced by the Court of Appeals, 9th Circuit, in *Greatreaks* v. *U. S.*, 211 F. 2d 674, to the effect that where, as here, (T. 58) the Court declares in advance that the entire class of testimony offered is inadmissible, no further offer of evidence is needed.

2. The question as to where, and if so, when and under what circumstances an offer of proof should be made in criminal cases in the Federal Courts to save an error of the trial court on review is of major importance in the trial of criminal cases. The Rules of Criminal Procedure are silent on the matter, while under Rule 43(c) of the Rules of Civil Procedure,[1] an offer of proof is provided for but the wording of the rule makes such an offer permissive, not mandatory. It is thus by no means apparent from the rules that in a criminal case an offer of proof is mandatory. The goal of the Federal Rules of Criminal Procedure is to achieve uniformity of rules applicable in trials of criminal cases in the Federal Courts. Only the courts can clarify such rules. With respect to the matter of an offer of proof in criminal cases, the lower courts have not done so.

The court below, in ruling that an offer of proof was "nonetheless appropriate and proper", cited in support thereof the trial court's opinion in *United States* v. *Peckham*, 105 F. S. 775. On an appeal in the Peckham case the Court of Appeals for the District of Columbia, reported in 210 F2d 693, in commenting on this ruling by the trial court, said:

> "When the examination is direct, a proffer, though usual, is not invariably required to obtain review of exclusion of a question."

It is believed that this Court's ruling in the Buckstaff case, supra, is or should be applicable to criminal cases. In the interest of fairness and justice and to achieve uniformity in criminal cases, this court should grant the writ herein petitioned for to establish a

(1) Appendix B, infra, p. 12

clearly defined procedural rule respecting offers of proof that will bring about a uniform application thereof in criminal cases in the Federal Courts.

3. The decision of the Court below is erroneous. The Court of Appeals concedes that under its own prior rulings[1] such conversations as those attempted to be shown by the witness were, under proper circumstances, admissible to show absence of a willful or unlawful intent to evade income taxes (Appendix A, p. 11). Yet the Court of Appeals, after conceding the error of the trial court, resolves that error against petitioner and in favor of the government which admittedly refrained from having its own witness testify as to such conversations. (T. 55) The Court of Appeals did so on the theory that an offer of proof should have been made, without which the court was unable to say that reversible error resulted from the exclusion. (Appendix A, p. 12) As stated above, the rule is to the contrary. The evidence related to reasons why an erroneous return was filed. The exclusion of such evidence in a tax evasion case, wherein the attempt alleged is the filing of a false return, is clearly prejudicial. Under our system, where doubts ought to be resolved in favor of the person accused, the erroneous ruling of the Court of Appeals should not be allowed to stand.

(1) Miller v. United States, CA-10, 120 F2d 968
Haigler v. United States, CA-10, 172 F2d 986

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRYANT H. CROFT
EARL P. STATEN
Counsel for Petitioner

PROOF OF SERVICE

I, Bryant H. Croft, of counsel of record for petitioner and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 16th day of August, 1957, I served, on behalf of petitioner herein, copies of the foregoing Petition for Writ of Certiorari on the United States by leaving a copy thereof at the office of A. Pratt Kesler, United States Attorney for the District of Utah, at Room 200 Federal Building, Salt Lake City, Utah, and by mailing two copies thereof in a duly addressed envelope with air mail postage prepaid to the Solicitor General, Department of Justice, Washington 25, D.C.

BRYANT H. CROFT

Of Counsel of Record for Petitioner

APPENDIX "A"

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MAY TERM, 1957

JOSEPH S. McDONALD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

} Number 5496

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Filed June 20, 1957

Bryant H. Croft (Earl P. Staten was with him on the brief) for Appellant;

C. Nelson Day, Assistant United States Attorney, (Charles K. Rice, Ass't Attorney General, Joseph M. Howard, Atty. Dept. of Justice, and A Pratt Kesler, United States Attorney, were with him on the brief) for Appellee.

Before HUXMAN, PICKETT and LEWIS, United States Circuit Judges.

HUXMAN, Circuit Judge.

Appellant Joseph S. McDonald was tried in the United States District Court for the District of Utah on a three count indictment charging violations of 26 U.S.C. § 145(b),[1] (income tax evasion). He was acquitted on counts one and two and found guilty on count three. A sentence of eighteen months' imprisonment and a fine of $10,000 was imposed. The principal ground relied upon for reversal is that the sentence imposed by the court is illegal and void in that the allegations of count three constitute a violation of 26 U.S.C. § 3616(a)[2] and that the sentence imposed is in excess of the maximum allowed by Section 3616(a). Whatever basis there may have been for this argument has been laid to rest by the decision of the Supreme Court in *Achilli* v. *United States*, decided May 27, 1957. The court there held that Section 3616(a) does not apply to income tax law violations and that all such offenses arise under and are controlled by Section 145(b). It follows that appellant was properly charged under Section 145(b) and that

---

[1] Section 145(b)

"(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

"Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

[2] Section 3616(a).

"Whenever any person —

(a) False returns.

Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; or, * * * ."

the sentence imposed being within the maximum authorized by that section is not excessive.

Other assignments of error need be noted only briefly. We are satisfied that count three adequately charged appellant with willfully and knowingly attempting to evade income taxes and that the evidence, if believed by the jury as it was, was sufficient to sustain the charge.

Without amplification we think it is sufficient to say that no reversible error was committed in excluding appellee's exhibits HH and QQ.

It is contended that the court erred in excluding evidence appellant sought to elicit from Lyle D. Dickson, a Government witness, who was made appellant's witness. Dickson was a certified public accountant who had testified for the Government. He had audited appellant's books. He was asked about conversations he had had with appellant while examining his books. Specifically he was asked, "Did you ask Mr. McDonald why he listed on his returns the various sources of compensation that were shown on the returns?" An objection was sustained to this question. It may be conceded as contended for by appellant that such statements or conversations under proper circumstances are admissible to show absence of a willful or unlawful intent to evade income taxes.[3] The difficulty is that no offer of proof of what appellant intended to prove by this witness was made. While the Rules of Criminal Procedure do not contain a provision comparable to Rule 43(c) of the Rules of Civil Procedure under

---

[3] See Miller v. United States (10th Cir.) 120 F. 2d 968; Haigler v. United States (10th Cir.) 172 F. 2d 986.

which a party may make an offer of proof where an objection has been sustained to a question, an offer of proof is nonetheless appropriate and proper in order to make a record of what examining counsel expects to elicit from the witness if the witness were permitted to answer the question.[4] In the absence of an offer of proof, we do not have the testimony before us and are thus unable to say that reversible error resulted from the court's ruling sustaining the objection to the question.[5]

An examination of the record in this case leads to the conclusion that no reversible error was committed, and the judgment is accordingly AFFIRMED.

APPENDIX "B"

43(c) RULES OF CIVIL PROCEDURE

"Record of Excluded Evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evi-

---

[4] United States v. Peckham, 105 F. Supp. 775, 777.

---

[5] Hunt v. United States, 231 F. 2d 784;
Christoffel v. United States, 200 F. 2d 734;
Elder v. United States, 202 F. 2d 465.

dence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."